

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**CRIMINAL APPEAL No. 381 of 1997****For Approval and Signature:****HONOURABLE MR.JUSTICE AKIL KURESHI**

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1 Whether Reporters of Local Papers may be allowed
to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy
of the judgment ?

4 Whether this case involves a substantial question
of law as to the interpretation of the
constitution of India, 1950 or any order made
thereunder ?

5 Whether it is to be circulated to the civil judge
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SADUR VIRA @ SADUR LAKHMAN KOLI & 5 - Appellant(s)**Versus****STATE OF GUJARAT - Opponent(s)**

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Appearance :

MR PM DAVE for Appellant(s) : 1 - 6.

MS HANSA PUNANI, APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI**Date : 17/12/2007****ORAL JUDGMENT**

1.This appeal arises out of a judgement and order
dated 20.3.1997 rendered by learned Additional
Sessions Judge, Kutch-Bhuj in Sessions Case

No.31/1991.

2. The appellants were the original accused who were charged with commission of offences punishable under Sections 397 and 395 of the Indian Penal Code. Learned Additional Sessions Judge by his impugned judgement and order convicted all the accused and sentenced them to rigorous imprisonment for a period of seven years for offence punishable under Section 397 of the Indian Penal Code and for a period of five years for offence punishable under Section 395 of the Indian Penal Code. Both the sentences were made concurrent. They were also ordered to pay fine of Rs.500/-.
3. From the charge exh.1 framed against the accused, it can be seen that the prosecution case was that on 10.12.1990 at about 1:30 at night, when the complainant and other family members had pitched their tents in the Sim of village Godpur, Taluka Bhachau for spending their night along with goats and sheep, the accused came there with intention of committing dacoity. They stole two sheep and had scuffle with the complainant and other family members. Accused caused grievous injuries to several persons and thereby committed offences punishable under Sections 397 and 395 of the Indian Penal Code.

4. The complainant Lakhabhai Karnabhai-PW1 was examined at exh.10. He stated inter-alia that he along with Karsan Naran, Gova Karna, Ghana Pachan and the lady members of family had left from Banni area to reach Gujarat. On the date of incident, they had pitched their tent in the Sim of village Godpur near the river. He was awakened by the noise of dogs barking. He saw some persons stealing the sheep. The accused were carrying iron rods, Dhoka, etc. He received injuries on his head caused by a stick. The blow was given by Sadur Vira. Gova Karna received a Dhariya blow on the hand. His thumb was cut off. He also received two more Dhariya blows on thigh and on his finger. This injury was caused to him by Lakhman Koli. Ghana Pachan also received a Dhariya blow on his thumb and elbow. Karsan Naran received knife blows on the stomach. One of them caused serious injury. There were other minor injuries also. These injuries were caused by the accused. The accused also received injuries and had fallen down. He had thereafter, given the complaint to the police after taking Sarpanch of the village Bhikabhai along with him. He identified all the accused before the Court as persons who had attacked them. He had participated in the Test Identification Parade carried out by the Executive Magistrate. He had identified three accused persons namely accused nos. 1,2 and 3. He also identified the weapons such as knife, Dhariyu, etc. which were seized

by the police from the place of incident itself.

4.1 In the cross examination, he denied the suggestion that there was a incident of stealing of his sheep at 10 0' clock on the same night and that he and others had received injuries during the fight which took place at that time. He denied the suggestion that accused persons were only passers-by who were attacked by him and other family members. He also denied the suggestion that he had pitched the tent in the fields belonging to some farmers despite their opposition.

5. Ghana Pachan Rabari-PW3 was examined at exh.18. He also narrated the incident in somewhat similar fashion. He stated that the accused were trying to steal the sheep and he and others were trying to prevent them from doing so. Accused therefore, gave Dhariya and knife blows. He received Dhariya blows on the thumb of right hand and on his elbow. His brother Gova Karna also received Dhariya blows which cut off his thumb and part of his hand. Karsan Naran received knife blows. He identified the accused persons who were present before the Court as the assailants.

5.1 In his cross examination, he denied the suggestion that when he was asleep farmers of the nearby fields had attacked them and caused

injuries. His dying declaration was recorded by the Mamlatdar. He was confronted with some of the statements made by him therein.

6. Karsan Naran-PW4 was examined at exh.19. He also stated that at about 1:30 in the night, upon hearing the dogs barking, Lakha Karna had woken up and upon hearing the noise others also got up. He stated that he received knife injuries and had become unconscious. He received treatment in the hospital for about 20 days. He identified the accused persons in the Court.

6.1 In his cross examination, he admitted that since it was dark, he could not state as to who caused which injury. He denied that injuries were caused by some other persons at about 10 0' Clock in the night and the accused were only passers-by later on and were attacked by him and other family members.

7. Gova Karna-PW5 was examined at exh.20. He also gave similar version of the incident. He identified the accused before the Court. He stated that till the police came in the morning, persons from both sides were lying in the field. After the police came, they were taken to the Government hospital. He stated that he lost his thumb due to Dhariya blow. He identified the Dhariya before the Court as one used in the attack.

7.1 In his cross examination, he was confronted with some of the improvements compared to the statements made before the police. He was also confronted with the statements that he made before the Mamlatdar as part of dying declaration. He stated that there were about 450 goats and sheep at that time.

8. Dr. Rameshbhai Prahladbhai Patel-PW2 was examined at exh.16. He was Veterinary Officer at Bhachau Veterinary Hospital. He had carried out the postmortem of the sheep which were found dead at the scene of offence. He opined that sheep had died on account of severing of jugular vein. He found that there were corresponding injuries on the neck of both the sheep.

9. Bhikabhai Vagha Rabari-PW14 was examined at exh.35. He was the Sarpanch of Jangi village. As per his deposition, when he was at his home on the date of incident, in the early morning the complainant came to his house and informed him about the incident. He therefore, at the request of the complainant, accompanied him to the police station and lodged the complaint at Adhoi police station.

9.1 In his cross examination, he denied any previous relations with the complainant and stated that complainant must have come to him because he was Sarpanch of the village.

10.Dr.Vinodkumar Jairamdas Thakkar-PW16 was examined at exh.38. He was the medical officer in charge of Community Health Centre, Lakadiya. He was the first person to treat the complainant Lakha Karna. He found one C.L.W. of 2cm x $\frac{1}{2}$ cm on the head about 3cm away from the left eyebrow. He also found one injury of 1cm x $\frac{1}{2}$ cm near the right ear and he found blood clotting of 2cm x 3cm on the right thigh. He stated that all the three injuries could have been caused by hard blunt substance.

10.1 In his cross examination, he admitted that in the injury certificate, he had not noted down the history given by the patient.

11.Dr. Hansaben Jagdish Dave-PW17 was examined at exh.40. She was the Doctor discharging her duties at the Community Health Centre, Bhachau at the relevant time. She had treated Rabari Gova Karna. She found one C.L.W. on the right thigh of 1cm x $\frac{1}{2}$ cm. She also found that tip of the right thumb had got severed. Right palm also had crushed injuries and X-ray revealed fracture and bone dislocation. She opined that first and third injury could be caused by hard blunt substance and second injury could be caused by a sharp edged weapon. She stated that the patient was admitted on 10.12.1990 and was discharged on 30.12.1990. She had also treated Rabari Dana

Pachan. She found that there were stitches on the right hand of the patient. There was one scratch mark on the right hand. Right thumb was crushed. X-ray revealed a fracture on the thumb. Patient was admitted on 10.12.1990 and was discharged on 19.12.1990.

11.1 In the cross examination, she admitted that in the injury certificate she had not noted down the history.

12.Dr.Chandrakant Mavjibhai Acharya-PW25 was examined at exh.66. He was the medical officer posted at Bhachau Health Centre at the relevant time. He had treated Karsan Naran and found that he had one incise wound on the left chest near the stomach of 2cm x $\frac{1}{2}$ cm which was bleeding. On the left side of the chest, he found another similar wound of 1cm x $\frac{1}{2}$ cm. He also found one incise wound in leg of $\frac{1}{2}$ cm x $\frac{1}{2}$ cm. Patient was kept as an indoor patient from 10.12.1990 to 1.1.1991. He found that injuries could have been caused by knife, Mudammal Article No.7. He had also given treatment to Ghana Pachan and Gova Karna. However, since their injuries have already been noted in the depositions of other Doctors, it would not be necessary to repeat his version thereof.

13.Babulal Amrutlal Dave-PW18 was examined at exh.45. He was the Mamlatdar who had carried out

the Test Identification Parade on 27.12.1990. In his deposition, he narrated the steps taken by him to carry out the Test Identification Parade. It may be noted that the complainant was called to identify the accused persons. Three of the accused persons namely accused nos. 1,2 and 3 were produced at that time and were identified by the complainant. It may also be noted that for the rest of the accused, no Test Identification Parade was carried out.

14.Exh.72 was the dying declaration of Ghana Pachan recorded by the Executive Magistrate. He had stated that on the date of incident he along with other family members had pitched their tents on the field to spend their night with their goats and sheep. At about 10 O' clock they had gone to sleep. At that time about six persons had come there and had stolen their goats and sheep. Sometimes thereafter, they came back again. He and other family members therefore, got up and ran after these persons. There was a scuffle and he therefore, received injuries on both the hands.

15.Dying declaration of Gova Karna is at exh.73. He had given similar account of the incident.

16.During the course of investigation, the police had seized the weapons used in the commission of offence as well as clothes of the complainant

and other injured witnesses.

17.It may be noted that a cross complaint was lodged against the complainant and other family members for offences punishable under Section 307 of the Indian Penal Code. The police had sought and was granted "C" Summary report therein.

18.From the above evidence on record, the prosecution sought to sustain the charge. As noted earlier, learned trial Judge convicted the accused persons for offences punishable under Sections 397 and 395 of the Indian Penal Code.

19.Learned advocate Shri P.M. Dave appearing for the appellants original accused submitted that there were number of internal contradictions in the different versions given by the so-called eyewitnesses. He submitted that statements were improved by the witnesses in their deposition before the Court as compared to their statements given to the police.

19.1 It was contended that no specific overt act was attributed to any of the accused persons. Their conviction therefore, cannot be sustained.

19.2 It was contended that the witnesses had given different versions before the Court as

compared with their dying declaration recorded by the Executive Magistrate.

19.3 It was further contended that except for accused nos. 1,2 and 3 no Test Identification Parade was carried out for rest of the accused.

19.4 It was contended that their names and description also did not match the accused.

19.5 In short, it was submitted that the Sessions Court committed grave error in recording the conviction of the accused and discarding the defence of the accused that they were only passers-by from the field and were attacked by the complainant and his family members which according to the learned Counsel was a very likely probable theory.

20. On the other hand, learned APP Ms. Hansa Punani appearing for the State opposed the appeal. She submitted that prosecution had laid reliable cogent evidence to prove the charge. Injuries on the accused were satisfactorily explained. The accused were arrested from the scene of incident. The eyewitnesses accounts of different witnesses and seized Mudammal articles including the weapons and the remains of dead sheep corroborates the eyewitnesses account. She submitted that learned Judge has given cogent

reasons and judgement is therefore, not required to be interfered with.

21. Having heard learned advocates appearing for the parties and having perused the material on record, it would appear that the prosecution has examined four eye witnesses namely Lakhabhai Karnabhai-PW1, Ghana Pachan Rabari-PW3, Karsan Naran-PW4 and Gova Karna-PW5. Their versions so far as the incident is concerned are largely concurring.

22. The complainant Lakhabhai Karnabhai-PW1 had stated that at about 1:30 at night, he was alerted on account of the dogs barking. It was found that some persons were stealing the sheep. He also gave account of blows given on himself as well as other family members. He also stated that accused persons also received injuries and had fallen down at the scene of incident. He stated that accused received injuries on account of scuffle between the two groups.

23. Ghana Pachan Rabari-PW3 also gave a similar version. He and other eyewitnesses had tried to stop the accused from stealing their sheep. In the ensuing fight, he received blows on his thigh and his elbow.

24. Karsan Naran-PW4 also narrated similar incident and had received a knife blow. Gova

Karna-PW5 also narrated the incident. He had also received injuries. He had received a Dhariya blow on the thumb and lost a part of his thumb.

25.All these eyewitnesses had identified the accused before the Court. There injuries were corroborated by Medical Officers who had treated them as noted earlier. The prosecution version was further corroborated by Bhikabhai Vagha Rabari-PW14 who was the Sarpanch of village Jangi. The complainant had first approached him before going to the police station for lodging the complaint. He also belonged to the Rabari community.

26.From the eyewitnesses account and corroboration that is available in form of medical evidence as well as deposition of Sarpanch Bhikabhai Vagha Rabari-PW14, the prosecution had successfully led evidence to prove the commission of offences by the accused.

27.Injuries caused to the witnesses were quite serious in nature. The witnesses had received Dhariya blows, knife blows and stick blows. Some of the witnesses had received knife blows in the stomach. One of the witnesses had also lost portion of the thumb on account of Dhariya blows.

28. Additionally, the prosecution had also collected the remains of two dead sheep. The Veterinary Doctor, Dr. Rameshbhai Prahladbhai Patel-PW2 who had carried out the postmortem of sheep had found that sheep had died on account of injuries received on the neck and resultant severing of vein and excess bleeding.

29. Prosecution had satisfactorily explained the injury on the accused persons. In fact, at the very outset the complainant Lakhabhai Karnabhai-PW1 had stated that in the ensuing fight the accused had also received injuries and had fallen down on the ground. In fact the prosecution case all through out was that after the incident complainant Lakhabhai Karnabhai-PW1, went to village Sarpanch and requested him to accompany him to lodge a complaint. After recording of the complaint, police went to the scene of incident where six accused were found on the spot and, thereafter, the injured witnesses as well as the accused were taken to hospital for treatment.

30. It can thus be seen that late at night the accused persons had tried to steal the belongings of the complainant and his family members. The complainant and other family members were alerted on account of noise probably of barking of the dogs. In trying to prevent the accused from stealing the sheep, the

fight ensued. The complainant and other family members were carrying sticks. The accused were carrying Dhariya, knife and iron pipes. Both sides received injuries. It can however, be seen clearly that accused were the aggressors and had attempted to commit dacoity and also caused grievous injury to some of the eyewitnesses who had tried to stop them from committing dacoity.

31. The defence version that the complainant and other family members were first attacked by some unknown person at 10 0' clock in the night and in retaliation, the complainant and his family members attacked the accused who were only passers-by later on, is not supported by any material on record. Though an attempt was made to put forth such defence, defence has not been able to probablise the theory. Firstly there is no such indication in the statements of the accused recorded under Section 313 of the Criminal Procedure Code. Secondly, except for the defence putting forth some suggestions to the eyewitnesses in the cross examination, nothing further is available on record to uphold such a defence. Thirdly there is no iota of explanation about the presence of accused persons at the scene of incident. It may be recalled that the complainant and his family had pitched their tents on the side of the river away from the village. The incident took place at about 1:30 in the night. It was month of

December. The accused were six in number. They were carrying Dhariya, knife and iron pipes. Surely, it would be too difficult to believe that they were innocent passers-by. They had not put forth any evidence, any suggestion or any such indication to probablise their version of simply passing by the spot and being attacked by the complainant and other injured eyewitnesses. Significantly, in the cross complainant, the police had sought and was granted "C" Summary report. It is true that there are certain minor contradictions in the statements of some of the witnesses. However, such contradictions are not significant so as to demolish the prosecution version in toto. It is also true that in dying declaration the witnesses PW3 and PW5 had narrated about one previous attempt on the same night of stealing of goats and sheep. No such incident is narrated by the witnesses in their deposition before the Court. This itself however, would not decide the reliability of several witnesses.

32. It is also true that against each accused, no specific allegation of having given a specific blow is made. However, fact remains that accused persons had given injuries to the complainant and other injured witnesses. Only because in the scuffle and on account of darkness, no exact description of which accused had given which blow could be given, conviction could not be

disturbed. It is also true that Test Identification Parade of only accused Nos. 1, 2 and 3 was carried out. However, all the accused were identified before the Court. Significantly, as noted earlier all the accused were arrested from the spot by the police next morning. About their presence, therefore, there was apparently no doubt. Additionally, though their alias names were revealed during the course of investigation, it is not the case of accused that they were not known by names disclosed in the complaint.

33.Considering all these aspects of the matter, conviction recorded by the learned trial Judge does not call for interference.

34.Learned advocate Shri Dave for the appellants however, submitted that the incident is an old one and many years have passed by and accused are not stated to have misused their liberty though they were on bail during the trial as well as during pendency of the appeal. He therefore, submitted that some leniency should be shown in the matter of sentence at-least. I however, find that under Section 397 of the Indian Penal Code, sentence of seven years is the minimum. No discretion is available to the Court to reduce the same below the said period.

35.Considering all these aspects of the matter,

appeal fails and is dismissed. Bail stands cancelled. The accused will however, have time upto 31.01.2008 to surrender.

(Akil Kureshi,J.)

(raghu)